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339-014—65

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1118

ARCHIBALD E. ROBERTS, PETITIONER

v.

STANLEY R. RESOR, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the district court (J.A. 111–112 [1]) and the *per curiam* opinion of the court of appeals (Pet. App. 2a–3a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 1968 (Pet. App. 1a). The petition for a writ of certiorari was filed on March 6, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "J.A." refers to the joint appendix filed in the court of appeals.

QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that a) petitioner's claim to promotion to Lieutenant Colonel had been abandoned, b) petitioner was not entitled to reimbursement for 102 days of accumulated leave, and c) petitioner was not entitled to reimbursement for civilian legal services.

2. Whether petitioner's First Amendment rights were in any respect violated.

STATUTES INVOLVED

10 U.S.C. 701(b) provides, in pertinent part:

> Notwithstanding any other provision of law, a member [of the Armed Forces] may not accumulate more than 60 days' leave. * * *

10 U.S.C. 1552, also involved, is set forth at Pet. App. 4a–5a.

STATEMENT

1. On April 19, 1962, petitioner, then a reserve officer—with the rank of Major—on active duty with the Army, delivered a speech before the national convention of the Daughters of the American Revolution without clearance, as required by Army regulations, and after an earlier submitted speech had been denied clearance. In the speech he ascribed a Communist background to the Mayor of Los Angeles and criticized an Assistant Secretary of State (see *Roberts* v. *Vance*, 343 F. 2d 236, 237 (C.A.D.C.)).

By order of the Secretary of the Army dated April 27, 1962, petitioner was relieved from assignment and from active duty and, effective May 7, 1962, was transferred to inactive status (J.A. 55–56). That order was

challenged and the court of appeals, in *Roberts* v. *Vance, supra,* held the order invalid because of the omission of certain steps in the prescribed Army procedure applicable in such situations. A remand to the district court was made for consideration of petitioner's motion for summary judgment "in the light of this opinion, and to conduct such further proceedings as may be necessary to determine the extent of the relief required" (343 F. 2d at 240).

An earlier Army action had been taken with respect to petitioner's conduct, which action was neither considered nor held invalid by the court of appeals. At a time prior to the D.A.R. speech, petitioner had been routinely selected, along with others, for temporary promotion to the rank of Lieutenant Colonel. The names on the promotion list were arranged in order of seniority, and promotions were made in that sequence. However, on April 19, 1962, following the speech at the D.A.R. convention but prior to the order transferring petitioner to inactive status on May 7, 1962, a so-called "flagging action" was initiated, pursuant to pertinent Army regulations, which suspended any favorable personnel actions pending the investigation of the statements petitioner had made (J.A. 67, 92). This action was expressly stated to be based upon related "unfavorable characteristics or integrity" (J.A. 67), and it was separate both in basis and in point of time from the subsequent transfer action (J.A. 55–56).[2]

[2] The court of appeals' opinion referred to the loss of promotion only indirectly (343 F. 2d at 237, 240, nn. 2, 11), in noting a variety of claims for relief that petitioner had advanced, in-

2. At the hearing on remand, petitioner's counsel stated that he would be unable to furnish proof that petitioner was entitled to promotion to Lieutenant Colonel, despite the reference thereto in petitioner's complaint. Counsel for both parties stated that they could reach an agreement on the relief to be ordered, and were directed to present an order setting forth the agreed relief (J.A. 2–3). On May 12, 1965, the district court entered its order (J.A. 4–5) declaring void the Secretary of the Army's order of April 27, 1962, and any orders implementing that order, and also providing (see Pet. 5):

> FURTHER ORDERED that defendants restore plaintiff to the status which he occupied in the United States Army prior to the unlawful action heretofore set aside [the order of April 27, 1962], together with all the rights, privileges and emoluments to which he would have been entitled, both by law and regulations, but for the unlawful and invalid order hereinbefore declared null and void.

No reference whatever was made to the separate earlier order of April 19, 1962.

3. The Army thereafter proceeded with steps to comply with the terms of the district court order, in-

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cluding others which were not pursued, *e.g.*, alleged loss of quartermaster and PX privileges, medical care access for petitioner and his family, and housing and travel privileges. Petitioner's statement (Pet. 4) that he would have been promoted but for the "illegal action" of the Secretary of the Army is, moreover, incorrect. This refers to the action of transferring petitioner from active status, effective May 7, 1962. Prior to that date, however, on April 19, 1962, the "flagging action" as to promotion had already been taken, and this action was not held illegal (see *supra*, p. 3).

cluding, *inter alia*, the reassignment of petitioner to active duty on August 6, 1965 (J.A. 57–58), the payment to petitioner of a total of $24,471.32 in back pay and allowances, and credit for 60 days of accumulated unused leave (J.A. 59). As to petitioner's promotion, which had been flagged prior to the invalid transfer order (*supra*, p. 3), the Army immediately initiated procedures to determine whether petitioner was qualified for promotion to Lieutenant Colonel (J.A. 63–64). A board of officers to which petitioner's records were referred found him not to be so qualified, and accordingly recommended the removal of his name from the 1961 promotion list (J.A. 61, par. 1).[3]

On September 2, 1965, petitioner applied for voluntary retirement, was placed on the retired list as of October 1, 1965, and became eligible for retirement pay at that time (J.A. 69–73).

4. On November 15, 1965, petitioner filed an application for correction of his military records, seeking administratively to obtain substantially the relief later sought in his "Motion for Compliance" filed in the district court (see *infra*, p. 7), *i.e.*, (1) temporary promotion to Lieutenant Colonel on active duty as of June 26, 1962 (the date he would have been reached for promotion absent suspension of personnel action), (2) payment of the monetary equivalent of the annual leave he asserted that he did not take during

[3] Subsequently, petitioner's records were again referred to a board of officers, for consideration under the same criteria and instructions established for the 1962, 1963, 1964, and 1965 selection boards, and this board similarly found petitioner not qualified for promotion (J.A. 61–62, par. 2).

the period when he was relieved from active duty, beyond the 60 days with which he had been credited, and (3) payment of $20,590.94 to reimburse him for the legal fees and other expenses allegedly incurred in connection with the litigation concerning the validity of the April 27, 1962, order.

The Army Board for Correction of Military Records held a hearing on petitioner's application, and on April 13, 1966, rejected all of the claims presently in issue. With respect to the claim to promotion to Lieutenant Colonel, the Board noted that a "flagging action" had been taken in regard to petitioner on April 19, 1962, and that the referral of his records to a board in 1965, after his restoration to active status, was "a proper action to determine his qualification for such promotion" (J.A. 109). In this regard, the Board concluded that "in the light of the applicant's conduct which led to his relief from active duty, it is reasonable to presume that such conduct would have precluded his promotion to lieutenant colonel, * * * had his relief from active duty not been effected," and accordingly found "no error or injustice in his failure to have been recommended for, or promoted to, the grade of lieutenant colonel * * * retroactive to 26 June 1962, upon his restoration to active duty in August 1965" (*ibid.*). In addition, the Board found that petitioner was not entitled to reimbursement for the 102 days of leave which he claimed (J.A. 109–110), and it further denied his application for reimbursement of legal fees and related expenses (J.A.

110).[4] The Board's recommendations were approved by the Under Secretary of the Army on October 17, 1966 (J.A. 91).

5. In January 1967 petitioner filed the instant "Motion for Compliance" in the district court, alleging that the Secretary of the Army had not complied with the district court's order of May 12, 1965, by failing (1) to correct the records to show petitioner as a Lieutenant Colonel on active duty from and after June 26, 1962, (2) to compensate him in accordance with the alleged rank, (3) to pay him the value of the 102 days of annual leave he had allegedly lost, and (4) to pay him the sum of $20,590.94 for his legal fees and expenses in obtaining the setting aside of the order transferring him to inactive status. He sought an order directing respondents to make the aforesaid correction of records and the requested payments (J.A. 7–13).

Respondents, in opposing the motion, pointed out that promotion in the Armed Forces, or the denial thereof, is a matter wholly committed to executive discretion and is not reviewable judicially, and that the claim as to promotion had in any event been waived by petitioner's counsel at the hearing prior to the district court's order of May 12, 1965 (see *supra*, p. 4, and J.A. 40–41, 50, 53–54). As to the claim for reimbursement of legal fees and expenses, respondents challenged the jurisdiction of the district

[4] The Board did recommend correction of the records to show petitioner's promotion to the rank of Lieutenant Colonel *in the Army Reserve*, and also a minor correction of the leave figures (J.A. 110).

court to order such reimbursement, since the United States was not a party to the litigation and in any event the amount claimed was in excess of $10,000 and therefore triable in the Court of Claims, if anywhere, under 28 U.S.C. 1346(a)(2). Moreover, it was noted that court costs may not be imposed against the United States and its officers, absent waiver of sovereign immunity. On the merits, respondents asserted that litigation costs are not an "emolument" of an Army officer, within the meaning of 10 U.S.C. 1552(c) (J.A. 49–53). Finally, with respect to compensation for the alleged loss of leave sought by petitioner, respondents similarly challenged the jurisdiction of the district court, and, as to the merits, called the court's attention to the unconditional bar of 10 U.S.C. 701(b) to the accumulation of more than 60 days of leave (J.A. 54).

6. The district court, in an order entered on November 27, 1967 (J.A. 111–112) held, in pertinent part that

> [petitioner's] "motion for compliance" be, and hereby is, denied: on the merits, insofar as plaintiff thereby seeks to recover (a) the attorney's fee (and other legal) expenses, amounting to $20,590.94, incurred in connection with this litigation, and (b) monetary compensation for leave in excess of the 60 days maximum cumulation permitted by 10 U.S.C. 701(b); and on the ground of abandonment, insofar as plaintiff thereby seeks promotion to the rank of Lieutenant Colonel as a Reserve Officer on active duty.

7. Upon appeal of this order by petitioner, the court of appeals affirmed *per curiam*, agreeing with the district court in all material respects, and noting that 10 U.S.C. 1552 did not provide for reimbursement for civilian legal services (Pet. App. 2a–3a).

ARGUMENT

Under the district court's order of May 12, 1965, entered pursuant to the remand by the court of appeals, respondents were directed to restore petitioner to such former rights, privileges, and emoluments of his active duty status as would have existed but for his invalid transfer from active duty on May 7, 1962. Two courts—the district court and the court of appeals—have determined that the provisions of the remand by the court of appeals have been fully met by the responsive actions of the Army, including payment of full back pay. Petitioner's claims of entitlement to further relief were correctly denied below, and in any event do not embody questions of general application so as to warrant additional review by this Court.

1. In the first place, nothing in the broad purposes underlying the establishment of military boards for the correction of records—"to remove an injustice"—purported to give these boards the virtually unlimited legislative powers possessed by the Congress in passing a private bill for relief. Neither the boards nor respondents were permitted to go beyond the limits of their statutory authority to make payments or take other requested actions. Nor were they in any

respect entitled to disregard outright the statutory bars to certain steps as, for example, the absolute prohibition on the accumulation of leave in excess of 60 days contained in 10 U.S.C. 701(b). In short, whatever relief petitioner was to obtain had necessarily to be provided within the framework of existing law.

2. Petitioner had no right to promotion to Lieutenant Colonel on active duty at the time of his invalid transfer to inactive status as of May 7, 1962. His normal course toward promotion had already been suspended prior thereto on April 19, 1962, immediately after his improper conduct at the D.A.R. convention. He thus no longer had any right to promotion that could be lost by the order of transfer, and accordingly no right to be restored upon the voiding of the transfer. His promotion was lost by reason of his conduct and not by reason of the transfer. The findings of later boards that petitioner was not qualified for such promotion involved, moreover, matters of executive discretion. See *Powell* v. *Brannan*, 196 F. 2d 871, 873 (C.A.D.C.); *Daub* v. *United States*, 227 F. Supp. 941, 944 (E.D.N.Y.). Petitioner's counsel thus acted properly in abandoning the claim to promotion, and the district court was correct in rejecting petitioner's later attempt to reassert that claim.[8]

[8] Petitioner's attempt to interject a First Amendment argument before this Court with respect to his non-promotion (Pet. 14–15) is both belated and lacking in merit. Petitioner makes no showing that, in the final determination as to his competence for promotion, his speech at the D.A.R. convention was the sole or even a critical element of the conduct taken into account. The denial of promotion—at all events a highly discretionary executive decision—would necessarily rest upon a

3. Petitioner was not entitled to accumulate leave in excess of 60 days during the period when he was relieved, albeit improperly, from active duty. The statutory bar contained in 10 U.S.C. 701(b) is absolute and could neither be waived nor ignored by the Army Correction Board. Such a body has never been given the unlimited authority to make payments that are the province of the Congress in passing a private bill (see supra, p. 9).

4. Finally, petitioner was not entitled to be recompensed for sums paid by him for attorney's fees and other expenses incurred incident to the instant civil litigation. His transfer to inactive status did not deprive him of anything he was entitled to as an Army officer in this regard, whether termed an "emolument" of his office or otherwise. While he subsequently argued that he requested a court-martial and that at such a proceeding the Army would have furnished an attorney for him, the denial of a court-martial was not seriously challenged. Nor was that denial set aside in the court of appeals or in the district court. Ac-

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composite of petitioner's entire record, including the consideration of his considerable past difficulties (see 343 F. 2d at 237, n. 1). While his earlier record, standing alone, had not yet blocked promotion, the combination of that record with the speech could disclose to the promotion boards the resumption of an intolerable pattern of disobedience and disregard of established service policy (see *supra*, p. 5). Such personality traits are obviously relevant to an officer's qualifications for promotion in rank and the enhanced responsibilities which would flow therefrom. Accordingly, the expansive constitutional right to unlimited speech by military officers, which petitioner here seeks to assert, is afforded no premise in the narrow factual situation of the instant case.

cordingly, no right to government-provided counsel was established; a *fortiori*, it cannot be shown to have been lost.[*] The court below thus correctly held that 10 U.S.C. 1552, on which petitioner relied, provided no basis for this claim (Pet. App. 3a).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1969.

[*] Moreover, if the district court had treated its May 12, 1965, order as calling for a reimbursement to petitioner of the legal expenses he claims, on the ground that he suffered damages to this extent by reason of having to challenge the invalid transfer order, the court would have run afoul of jurisdictional limitations in 1) entertaining a species of tort claim without waiver of sovereign immunity to suit, and 2) entertaining a claim in excess of $10,000 in violation of 28 U.S.C. 1346(a)(2), since petitioner asserted that his legal expenses were in excess of $30,000 (see *supra*, pp. 7–8).

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